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CITATIONS

685330—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 826

WILLIAM LEITHOLD AND EMILY LEITHOLD, INDIVIDUALLY AND AS CO-PARTNERS TRADING AS CUSTOM MAID BRASSIERE COMPANY, PETITIONERS

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 45a–57a) is reported in 60 F. Supp. 909. The opinion of the circuit court of appeals (R. 66–75) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 27, 1945 (R. 75–76). The petition for a writ of certiorari was filed on February 9, 1946. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 25, 1925.

QUESTION PRESENTED

Upon a showing that petitioners had consistently violated the record-keeping requirements of certain price regulations to which they were subject, did the district court abuse its discretion in enjoining not only further violation of record-keeping provisions but likewise violation of price ceilings established by those regulations, even though price violations had not been alleged or proved?

STATUTE INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, (56 Stat. 23; 50 U. S. C. App. 901, *et seq.*, as amended by the Stabilization Extension Act of 1944, 58 Stat. 632, 50 U. S. C. App. Supp. IV, 901, *et seq.*) are Sections 4 (a), 202, and 205 (a). Section 4 (a) provides:

> It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accord-

ance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

Section 202 provides:

(a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act, and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

Section 205 (a) provides:

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

STATEMENT

Petitioners, as co-partners engaged in the manufacture of brassieres, were, without dispute, subject to the provisions of the General Maximum Price Regulation (GMPR), 7 F. R. 3153, and Maximum Price Regulation (MPR) 220, 7 F. R. 7282. Sections 1499.11 and 1499.12 of the GMPR required the preparation and retention of a base period statement and current pricing records. See Appendix, *infra,* pp. 13–14. Section 1315.-1557 of MPR 220 required certain additional reports to be filed with the Office of Price Administration. Records are required by the regulations because, under the method of price fixing which these regulations embody, the records are nec-

essary to enable a seller to establish and know his own ceilings and to enable the public and Office of Price Administration to check whether he is abiding by them.[1]

For a period of twenty-seven months after the GMPR went into effect, petitioners failed to provide the information required by that regulation (R. 48a). Petitioners likewise paid no attention

[1] Thus, for example, the General Maximum Regulation (7 F. R. 3153), the general regulation to which petitioners were subject, provides four pricing methods. Section 2 (a) fixes maximum prices at the highest price charged by the seller during March 1942 for the same or similar commodities. If the seller did not sell the same or similar commodities during March 1942, Section 2 (b) fixes his maximum prices at the highest prices charged during March 1942 by his most closely competitive seller for the same or similar commodities. If he has no competitive seller whose prices can be used as a standard, Section 3 provides a formula based on his maximum prices for his most comparable commodities. Finally, if the seller is unable to determine a maximum price under the preceding provisions, he is directed to file an application with the Office of Price Administration for approval of a proposed maximum price.

It will be seen that this pricing system requires the retention of necessary data in readily usable form. Neither the seller nor the Office of Price Administration can tell what the seller's maximum prices are unless he has some sort of statement showing precisely what types of commodities he sold during the base period, what the prices for those commodities were, and what precise types of commodities he sells currently. In addition, it is often essential, under these price-fixing methods, that the seller have the data concerning the comparability of various commodities. Sections 11 and 12 of the General Maximum Price Regulation specify what records must be kept. Appendix, *infra*, pp. 13–14.

to the provisions of MPR 220, requiring that reports be filed (R. 48a).

In order to bring petitioners into compliance with these regulations, respondent brought this action under Section 205 (a) of the Act (R. 3a–7a). As relief, respondent requested an injunction directing petitioners to prepare and keep for examination the records required by the GMPR; directing petitioners to file the reports required by MPR 220; restraining petitioners from selling any commodities subject either to the GMPR or MPR 220 until they had so complied; and restraining petitioners from selling such commodities at prices in excess of the maximum prices established by those regulations[2] (R. 6a-7a).

Petitioners admitted the charges of violations, but claimed that since the filing of the bill they had complied with the record-keeping requirements of the GMPR, and that, in any event, the injunction should not extend to price violations of which there was no proof (R. 46a). The district court, in the exercise of its discretion, granted the full relief requested by the complaint (R. 57a–

[2] The opinion of the district court points out that defendants claimed they had discontinued the manufacture of elastic garments and thus were no longer subject to MPR 220 (R. 46a). The court's decree, however, guards against future record-keeping and price violations of MPR 220 (R. 57a–58a), and, apparently, no particular question as to that provision of the injunction is raised here.

58a). On appeal from this order, the Circuit Court of Appeals for the Third Circuit affirmed, concluding that on the "set of facts" before it, there was no abuse of discretion shown (R. 66–75).

ARGUMENT

1. In refusing to disturb the trial court's exercise of discretion in restraining price-ceiling violations, where petitioners had, for more than two years, consistently violated the record-keeping requirements of the regulations, the court below rendered a decision wholly in keeping with applicable decisions of this Court. It paid heed to the admonition of this Court in *Hecht Co.* v. *Bowles,* 321 U. S. 321, that discretion under Section 205 (a) "must be exercised in light of the large objectives of the Act" (p. 331), and to the report of the Senate Committee in charge of the Price Bill, which said, with respect to Section 205 (a) of the Act, that "Such courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case". S. Rep. No. 931, 77th Cong., 2d sess., p. 10.

Section 205 (a), *supra,* p. 4, authorizes the issuance of decrees of the broadest sort. Their permissible scope is defined by reference to the violations set out in Section 4 of the Act. *Supra,* p. 2. The order for which the Administrator is authorized to apply is "an order enjoining such acts or practices", and the "acts or practices"

referred to are described in the opening clause of Section 205 (a) as "any acts or practices which constitute or will constitute a violation of any provision of section 4". Section 4, in turn, embraces all violations of all price regulations.

The claim of petitioners that the decision of the court below is inconsistent with applicable decisions of this Court, notably *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361, is without merit.

In that case, the Interstate Commerce Commission contended that "whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular it is the duty of the court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular." 200 U. S. at 404. This Court held that such an injunction was objectionable in that it was too vague and subjected a person to the "jeopardy of punishment for contempt for violating a general injunction" *ibid.*[3] In the case at bar, however, petitioners run no such risk

[3] In one respect, the decree of the court was broadened. The Chesapeake and Ohio Railroad Co. had violated the Elkins Act by contracting to sell coal at a price which included carrying charges below its published tariff. Overruling the lower court's decision which limited the injunction to the particular contract involved, the Supreme Court extended its scope by "perpetually enjoining the Chesapeake and Ohio from taking less than the rates fixed in its published tariff of freight rates, by means of dealing in the purchase and sale of coal." 200 U. S. at 405.

if an injunction is granted restraining them from violating the price ceilings established by the GMPR and MPR 220. This is not a decree couched in vague or general terms. By its express terms, petitioners are informed, as accurately and exactly as the case permits, as to what they are forbidden to do. Petitioners could not mistake the bounds of the injunction since pricing formulas and pricing requirements are plainly contained in the specified regulations; and by complying with the record-keeping requirements, petitioners will be in a position to know what their maximum prices are.

2. To safeguard the public interest, the scope of an injunction must be such as will prevent violations, the threat of which are to be anticipated "because of their similarity or relation" to those unlawful acts which are charged and proven. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 437. Price-ceiling violations "bear some resemblance" or "relation" to those which petitioners have committed in disregarding record-keeping requirements, and "danger of their commission in the future" is to be anticipated from the petitioners' course of conduct in the past. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. at 436. The effect of petitioners' conduct, the court below noted, "was as complete a disregard of the wartime control statute as if they were operating at the North Pole" (R. 71).

Actually, petitioners' complete indifference to the record-keeping requirements makes their conduct more reprehensible than a seller's who compiles his records but merely sells certain items at prices in excess of the ceiling. Petitioners have made absolutely no effort to comply at all. For over two years they lived as though there were no price control, meanwhile securing for themselves a special and favored position as compared to competitors who had complied with the Act. The courts below were justified in believing that a defendant who made it "practically impossible" for anyone to determine whether price ceilings were violated, was "not unlikely to violate those ceilings under cover of the darkness which his failure to give information had created" (R. 72). And even if by some chance price violations do not in every instance flow from failure to comply with record keeping requirements, "At least it is not unreasonable for one to conclude that such a happening is within the range of probability and to guard against it by injunction" (R. 72).

The decision of the court below, "on a set of facts not heretofore dealt with by * * * any other of the Circuit Courts of Appeals" (R. 74), is not, as petitioners claim, in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Bowles* v. *Sacher,* 146 F. 2d 186, but is consistent therewith. In that case, the circuit court of appeals, indicated that, on the motion for a preliminary injunction before trial, it

knew nothing of defendant's motives, wilfulness or negligence and added, "This is not to say that an injunction should never be issued broader in scope than the violations actually proved; a decision of that question may properly await a case which presents it". Here, the question arises after final hearing (R. 46a) and the district court found no justification for petitioners' failure to keep records. And here, as in *Bowles* v. *Sacher, supra,* at 187, the court below could find "no abuse of discretion and on this ground" affirmed the judgment of the trial court.

3. The court below did not, as petitioners claim, hold that "violation of record-keeping provisions of OPA regulations per se justifies an injunction against price-ceiling violations which are not alleged, proven or shown to be intended, threatened or likely to occur." (Pet. 5.) The decision of the court below was specifically limited to the "set of facts" before it, under which petitioners failed for twenty-seven months after the Regulation became effective to provide the information required, thereby rendering almost impossible a showing of price-ceiling violations, no matter how often repeated.

From petitioners' continued living outside the Act so far as record-keeping requirements were concerned, the trial court concluded that it was not unreasonable to anticipate the commission of price violations in the future unless enjoined. And the circuit court of appeals did not think this

conclusion was so clearly erroneous as to set it aside.[4] There is no warrant for further review, by this Court, of the narrow issue in this case.

CONCLUSION

The decision of the court below is correct and is not in conflict with applicable decisions of this Court or with the decision of any circuit court of appeals. For these reasons, and the reasons set out above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,

MILTON KLEIN,
Director, Litigation Division,

DAVID LONDON,
Chief, Appellate Branch,

NATHAN SIEGEL,
Special Appellate Attorney,
Office of Price Administration.

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[4] The court below was of the opinion that this Court's recent decision in *May Department Stores Company* v. *N. L. R. B.*, No. 39, this Term, strengthens the conclusions reached by it. "Our particular situation is, we think, blanketed by the sentence: 'Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act.'" (R. 75.)